Filed 2/28/19 P. v. Wallace CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOHNATHAN PAUL WALLACE, Defendant and Appellant.	D073373 (Super. Ct. No. JCF37418)

APPEAL from a judgment of the Superior Court of Imperial County, Poli Flores, Jr., Judge. Affirmed as modified.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Junichi P. Semitsu, Deputy Attorneys General, for Plaintiff and Respondent.

Johnathan Paul Wallace used Facebook to lure a 15-year-old girl (Jane Doe) into engaging in sex acts with him on multiple occasions. He pleaded no contest to eight

counts occurring "[o]n or about" July 29, 2016:[1] sodomy with a person under 16 years (Pen. Code,[2] § 286, subd. (b)(2), count 1); oral copulation of a person under 16 years (§ 288a, subd. (b)(2), count 2); unlawful sexual intercourse with a minor under the age of 16 years (§ 261.5, subd. (d), count 3); arranging a meeting with a minor for lewd purposes (§ 288.4, subd. (b), count 4); contacting a minor with the intent to commit a sexual offense (§ 288.3, subd. (a), count 5); selling or transporting marijuana (Health & Saf. Code, § 11360, subd. (a), count 6); possessing child or youth pornography (§ 311.11, subd. (a), count 7); and contributing to the delinquency of a minor (§ 272, subd. (a)(1), count 8).

The trial court sentenced Wallace to a total determinate term of five years in prison, consisting of: the upper term of four years on count 4, a consecutive one-year term on count 6, and concurrent terms on counts 1 (three years), 2 (three years), 3 (four years), 5 (three years), and 7 (three years). The court stayed his one-year sentence for count 8 under section 654, but impliedly denied his request to stay the sentences on counts 4 and 5.

Wallace appeals, contending that his sentences on counts 4 and 5 (arranging a meeting with a minor for lewd purposes and contacting a minor with the intent to commit a sexual offense) should be stayed under section 654 because these offenses were preparatory offenses to counts 1 through 3 and derive from the same criminal objective

---

1 All date references are to 2016.

2 Undesignated statutory references are to the Penal Code.

because it was not possible to commit counts 1 through 3 without first committing the preparatory offenses. Wallace argues that his sentences on counts 6 and 7 (selling or transporting marijuana and possessing child pornography) should also be stayed because he committed these crimes with the same intent and objective as counts 1 through 3.[3] The People disagree, arguing that counts 4 through 7 were fueled by independent criminal objectives and involved distinct acts completed before—or commenced after—the sexual activity that may have supported counts 1 through 3. We agree with Wallace on counts 4 and 5, but agree with the People on counts 6 and 7.

Wallace contends, and the Attorney General concedes, that the abstract of judgment needs to be corrected to reflect that count 1 involved a violation of subdivision (b)(2) of section 286, not section 288. We agree and order that the abstract be corrected. (*People v. Jones* (2012) 54 Cal.4th 1, 89.)

FACTUAL BACKGROUND

In June Wallace and Doe first interacted on Facebook, Doe told him that she was 15 years old, while appellant lied and said that he was 18 years old. Wallace later told Doe that he was 23 years old and lied to her about his age because he did not want to scare her away. On July 12 Wallace and Doe exchanged messages arranging to meet at their " 'same spot' " inside his vehicle, suggesting that they had already previously met. On July 17 Wallace asked Doe, " 'Are we gonna get high and fuck[?]' " Doe said they would if she had the money for it.

---

3 Although Wallace did not raise this issue at sentencing, he correctly contends this alleged error resulted in an unauthorized sentence, an error that can be raised at anytime. (*People v. Perez* (1979) 23 Cal.3d 545, 549-550, fn. 3.)

The pair met after these exchanges, referencing their sexual activities and showing that Wallace provided Doe with marijuana. Wallace was arrested after an officer from the Department of Homeland Security's Internet Crimes Against Children Task Force posed as Doe and convinced him to meet at a particular location.

DISCUSSION

Section 654 prohibits punishment for two or more offenses arising from the same act or from a series of acts constituting an indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1216 (*Latimer*).[4] " 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all the offenses were incident to one objective, the defendant may be punished for any one of the offenses but not more than one.' " (*People v. Correa* (2012) 54 Cal.4th 331, 336.) "When a trial court sentences a defendant to separate terms without making an express finding the defendant entertained separate objectives, the trial court is deemed to have made an implied finding each offense had a separate objective." (*People v. Islas* (2012) 210 Cal.App.4th 116, 129.) Such findings will be upheld on appeal if supported by substantial evidence. (*Ibid.*)

In *Latimer*, *supra*, 5 Cal.4th 1203, the defendant kidnapped the victim, drove her to the desert, and raped her. (*Id.* at p. 1206.) He then drove the victim further into the

---

4 Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

desert and raped her again. (*Ibid.*) He pleaded guilty to two counts of rape and one count of kidnapping. (*Ibid.*) The California Supreme Court held that section 654 applied, explaining that "[a]lthough the kidnapping and the rapes were separate acts, the evidence d[id] not suggest any intent or objective behind the kidnapping other than to facilitate the rapes." (*Id.* at p. 1216.) Thus, "section 654 bar[red] execution of sentence on the kidnapping count," which carried the lesser sentence. (*Id*. at pp. 1206, 1216.) Separate punishment for each of the rapes, however, was proper. (*Id.* at pp. 1216-1217.)

The court in *People v. Medelez* (2016) 2 Cal.App.5th 659 (*Medelez*) held that a defendant can be convicted of both contacting a minor with intent to engage in oral sex and attempting to engage in oral sex, but that section 654 prohibits punishment on both counts because the contact was initiated for the purpose of engaging the same conduct that was attempted. (*Id*. at pp. 663-664.) We conclude that the same principle applies here and that substantial evidence does not support the court's implied finding that Wallace's intent and objective behind contacting and arranging to meet Doe was for a purpose other than to facilitate his lewd conduct with Doe.

It is a crime to arrange a meeting with a minor for a lewd purpose. (§ 288.4, subd. (b).) It is also a crime to contact or communicate with a minor with the specific intent to commit certain enumerated sex offenses, including sodomy and oral copulation. (§ 288.3, subd. (a).) In counts 4 and 5, Wallace pleaded guilty to "[on] or about" July 29 arranging a meeting with Doe and communicating with Doe with the intent to engage in a lewd act. In counts 1 through 3, Wallace pleaded guilty to engaging in lewd acts with

Doe "[on] or about" July 29. Wallace was punished in counts 1 through 3 for the crimes for which he lured Doe and arranged to meet with her.

Wallace's acts in counts 4 and 5 were incidental to and were the means of accomplishing or facilitating one objective—engaging in lewd acts with Doe "[on] or about" July 29. In other words, Wallace could not have engaged in lewd acts with Doe unless he first contacted her and then arranged to meet her. Thus, these precursor crimes formed part of a course of conduct constituting an indivisible transaction. Thus, imposing a concurrent sentence for counts 4 and 5 violated section 654. Since count 3 (unlawful sexual intercourse with a minor under the age of 16 years) now provides for the longest term of imprisonment, four years, the trial court is directed to designate count 3 as the principal term and stay the sentences on counts 4 and 5.

Although Wallace had numerous contacts, meetings and lewd sexual encounters with Doe, he was charged and pleaded guilty to one count of each crime, with all crimes occurring close in time. Wallace was not charged or convicted of any earlier or later offenses and the record does not suggest that a sequence of distinct objectives may be attributed to Wallace. Accordingly, Wallace's sentences on counts 4 and 5 must be stayed under section 654.

We conclude, however, that the evidence supports the court's implied finding that Wallace entertained separate intents and objectives for the conduct underlying his convictions on counts 6 and 7 (selling or transporting marijuana and possessing child pornography).

In count 6, Wallace pleaded guilty to selling or transporting marijuana in violation of Health and Safety Code section 11360, subdivision (a). The record suggests that Wallace sold Doe marijuana, specifically when Wallace asked Doe if they were " 'gonna get high and fuck' " and Doe responded they would if she had the money for it. This evidence suggests his intent and objective in count 6 was to make a profit, rather than using marijuana as a means to facilitate his lewd acts with Doe. Since the evidence supported the trial court's implied finding that Wallace had separate criminal objectives, the trial court did not err in imposing a separate sentence on count 6.

In count 7, Wallace pleaded guilty to possessing child pornography. Wallace possessed multiple sexually explicit images of Doe and a video of Doe fellating him. The record suggests that Wallace may have possessed and used the pornography to arouse other minors. A search of Wallace's electronic devices revealed that he had communicated with two other minor victims, grooming them and trying to meet with them for sexual intercourse. The probation report stated: "There was one point where the defendant told one of the minor girls that 13 years old is the youngest he would have sex with, they look so good. He even asked the minor girl if she wanted to see the 13 year old girl he had sex with." While it is unclear whether Wallace possessed child pornography involving minors other than Doe, Wallace's statements support an inference that he used child pornography with the independent objective of meeting and arousing other minors. (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1294, 1296 [desire to arouse victim with pornographic movies constituted a separate objective that is independent and not merely incidental to rape of victim].) Thus, the trial court properly sentenced Wallace on count 7.

DISPOSITION

The judgment is modified to designate count 3 as the principal term and stay the sentences imposed for counts 4 and 5 pursuant to Penal Code section 654. As so modified, the judgment is affirmed. The trial court is directed to modify the abstract of judgment to reflect these changes and to correct the abstract to show that count 1 involved a violation of Penal Code section 286, subdivision (b)(2). The court is further directed to prepare an amended abstract of judgment reflecting these modifications and to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

O'ROURKE, J.